

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET N.W., 6TH FLOOR

WASHINGTON, D.C. 20006

July 11, 2000

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

GUILMETTE BROTHERS CORPORATION

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Docket Nos. YORK 99-65-M and 99-66-M

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, Commissioners

ORDER

BY: Marks, Riley, and Verheggen, Commissioners

These civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On February 1, 2000, Chief Administrative Law Judge David Barbour issued orders of default to Guilmette Brothers Corporation ("Guilmette") for failing to answer the petitions for assessment of penalty filed by the Secretary of Labor on November 9, 1999, or orders to respondent to show cause issued on December 16, 1999. The judge assessed civil penalties in these two proceedings totaling \$3,629, as proposed by the Secretary.

On April 28, 2000, the Commission received a letter from George Guilmette, explaining that his wife had undergone a serious operation for cancer in December and that he had forgotten about the hearing date. Mot. Attached to his request are copies of the judge's default orders in these proceedings. Guilmette requests a hearing to contest these violations. The Secretary does not oppose Guilmette's request.

The judge's jurisdiction in this matter terminated when his decision was issued on February 1, 2000. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). The Commission received Guilmette's letter on April 28, 2000, after the judge's default orders had become final decisions of the Commission.

Relief from a final Commission judgment or order is available to a party under Fed. R. Civ. P. 60(b)(1) in circumstances such as mistake, inadvertence, or excusable neglect. *F. W. Contractors, Inc.*, 17 FMSHRC 247, 248 (Mar. 1995); *see* 29 C.F.R. § 2700.1(b) (Federal Rules of Civil Procedure apply “so far as practicable” in the absence of applicable Commission rules). In the interest of justice, we reopen the proceedings, treat Guilmette’s letter as a late-filed petition for discretionary review requesting relief from a final Commission decision, and excuse its late filing. *See General Chemical Corp.*, 18 FMSHRC 704, 705 (May 1996).

Guilmette failed to respond to the Secretary’s petitions and the judge’s show cause orders because his wife was undergoing cancer surgery. It appears that Guilmette is a small, pro se operator. Under these circumstances, we find that Guilmette’s failure to respond to the judge’s show cause orders amounts to inadvertence or mistake. *See Northern Kansas Rock, Inc.*, 22 FMSHRC 486, 487-88 (Apr. 2000) (granting request to reopen where the operator failed to timely file because husband was undergoing medical treatment and surgery); *Tigue Construction Co.*, 21 FMSHRC 9, 10-11 (Jan. 1999) (granting operator’s request where its vice president, who was the employee responsible for answering charges, unexpectedly underwent quadruple bypass surgery); *Kenamerican Resources, Inc.*, 20 FMSHRC 199, 200-01 (Mar. 1998) (reopening proceedings where operator’s safety director, who routinely handles MSHA violations, was home recovering from surgery).

Accordingly, we vacate the judge’s default orders, grant Guilmette’s motion, and reopen for further proceedings on the merits. The case shall proceed pursuant to the Mine Act and the Commission’s Procedural Rules, 29 C.F.R. Part 2700.

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Chairman Jordan and Commissioner Beatty, dissenting:

On the basis of the present record, we are unable to evaluate the merits of Guilmette's position and would remand the matter for assignment to a judge to determine whether Guilmette has met the criteria for relief under Rule 60(b). *See Wolf Creek Sand & Gravel*, 21 FMSHRC 1, 1-2, 3 (Jan. 1999) (remanding to judge to determine whether operator's claim that it failed to timely file due to secretary's absence as a result of her husband's health problems met criteria for relief under Rule 60(b)); *Miller employed by Mid-Wisconsin Crushing Co.*, 16 FMSHRC 2384, 2385 (Dec. 1994) (remanding where the movant claimed he failed to timely file his hearing request due to secretary's absence because of her mother's terminal illness). We note that George Guilmette's explanation that, due to his wife's operation, he "forgot the date of the hearing" (Mot.), is seemingly incongruous with a default suffered as the result of the failure to file an answer to civil penalty petitions. We also note that Guilmette has failed to provide any affidavits or other sufficiently reliable documents to substantiate its allegations.

Mary Lu Jordan, Chairman

Robert H. Beatty, Jr., Commissioner

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